

FIRST INTERIM REPORT OF THE SUBCOMMITTEE ON THE JUDGES' ROLE IN THE BAR AND WITH COMMUNITIES

Introduction

Town hall meetings conducted throughout the state of Maryland revealed that attorneys felt a higher degree of professionalism from those judges that participated in the bar and the community. The Maryland Code of Judicial Conduct sets forth the guidelines for judges to uphold an appearance of dignity and respect in the community not only for themselves but the entire judicial system. The subcommittee was charged with the duty of analyzing judges' active participation with the bar and as involved members of their respective communities in light of any limitations on judicial behavior imposed by the Maryland Code of Judicial Conduct.

MARYLAND RULE 16-813 Canon 1 (2005), addresses the honorability of a judge in society. "An independent and honorable judiciary is indispensable to justice in our society. A judge shall observe high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective." This Canon requires a judge to maintain these standards at all times, both on and off the bench, especially when participating in community activities.¹ The following discussion outlines specific community activities addressed by the Maryland Code of Judicial Conduct and the standards a judge should maintain when participating:

I. Extra-Judicial Activities

a. Boards

The Code permits judges to participate in community functions. MARYLAND RULE 16-813 Canon 2 (2005), mandates that a judge avoid all appearances of

¹ Id.

impropriety and comply with the law at all times, both on and off the bench. A judge who is a member of a board must not allow that activity to influence or appear to influence her decisions on the bench.² Specifically, MARYLAND RULE 16-813 Canon 4 (C) (2005), permits judges to contribute to the legal system and the community through participation on boards dedicated to such a mission. A judge may participate as a director, member, non-legal adviser, officer, or trustee of the Board.³ However, it prohibits board membership in organizations that regularly engage in adversarial proceedings in court or deal with people who are referred to the organization by any court. MARYLAND RULE 16-813 Canon 2 (C) (2005), prohibits a judge from holding membership in an organization that practices discrimination on the basis of national origin, race, religion or sex. Therefore, a judge should not promote professionalism by appearing before Boards where a judge would be prohibited from joining the organization as a member or serving on the Board as prohibited by these canons. A judge participating in any capacity on a board must be sure to limit her participation so that it does not overlap with activities such as fundraising, which create the appearance of impropriety.⁴ For his/her duties as a member of a board, a judge may accept reimbursement when it does not give the appearance of impropriety and the compensation is reasonable.⁵

b. Commissions

Participation on commissions is also permitted by the Code. A judge that participates on commissions renders invaluable services to those organizations. The

² Id.

³ Id.

⁴ Id.

⁵ MARYLAND RULE 16-813 Canon 4 (E) (2005).

same rules and regulations described above apply to a judge participating on a commission. A judge participating on a commission must be careful not to create the appearance of impropriety or in any other way compromise the integrity of the judiciary.⁶ The Code allows participation on a commission that contributes to the administration of justice or in some other way improves the legal system.⁷ As with board participation, a judge must ensure her participation does not influence her duties as a judge, and she may receive reasonable reimbursement for her participation.⁸

c. Bar Association Functions

Although there does not appear to be any specific language permitting judges to actively participate in Bar Association activities (other than socially, Bar Associations likely fall within the umbra of a “Law Related Organization”), by long standing tradition, members of the judiciary have participated in Bar activities.⁹ A judge participating in bar association functions must do so while abiding by the other provisions of the Code regarding reimbursement, prohibited activities, and avoiding appearances of impropriety.¹⁰

Not all judges agree with that position. Shortly after being sworn in, those judges tend to retreat from all contact with lawyers, apparently on the theory that any contact with lawyers might possibly raise the appearance of impropriety. In striving for the purity of Caesar’s wife, they eliminate the leavening effect of interacting with

⁶ MARYLAND RULE 16-813 Canon 2 (2005).

⁷ MARYLAND RULE 16-813 Canon 4B (2005).

⁸ MARYLAND RULE 16-813 Canon 4 (B) (3) (2005).

⁹ MARYLAND RULE 16-813 Canon 4 (C) (2005).

¹⁰ See *supra* Part 1.a-b.

lawyers who actually practice law. Many observers feel that the cure is worse than the diseases, particularly as the number of years on the bench increase.

d. Education Endeavors in the Community

The Code permits judicial involvement in educational endeavors in the community. The rules advocate that a judge should not be isolated from the community.¹¹ A judge contributing to educational endeavors in the community may represent the country, a state, or a locality in ceremonial occasions in connection with that activity.¹² A judge's involvement in community functions must remain impartial.¹³ For example, a judge participating in educational endeavors in the community must uphold the appearance of impropriety and must not make discriminatory jokes or any other comments that would question the impartiality of the judge or the judiciary as a whole. Finally, as with the other activities, a judge contributing to educational endeavors may receive appropriate reimbursement for her contribution.¹⁴ There are at least six published opinions of the Judicial Ethics Committee that touch upon a judge's activities in the Community that may be useful to any further analysis of this issue. (Opinions 42,45,52,100,116 and 2003-26.)

e. Limitations on Extra-Judicial Activities

As a general rule, judges are permitted to participate in educational activities in the community both with regard to the law and other matters. There are some important restrictions on judges that may affect their participation.

¹¹ Maryland Rule 16-813 Canon 4 (A) cmt. at 418 (2005).

¹² MARYLAND RULE 16-813 Canon 4 (C) (2005).

¹³ MARYLAND RULE 16-813 Canon 2 (2005).

¹⁴ MARYLAND RULE 16-813 Canon 4 (E) (2005).

A judge must comply with the Canons in their conduct both in and out of court. In addition to the requirements of MARYLAND RULE 16-813 Canon 4 (2005), a judge must be certain that their outside educational activities do not cause them to comment upon active cases (e.g. MARYLAND RULE 16-813 Canon 3 (A) (7) (2005)). Teaching or other educational activities in the community are acceptable, provided that the judge's compensation for the activities is in compliance with both the Canons and the State Ethics Rules and the Financial Disclosure requirements. The judge must also be sensitive to the non-political requirements of MARYLAND RULE 16-813 Canon 5 (2005). The most important limitation on a judge's teaching activities in the Community is the language in the Canons that directs that the activity should not impinge upon either the judge's impartiality or interferes with the proper performance of judicial duties.¹⁵

If the Professionalism Commission wishes to encourage judges to take a more active role in the education of the public as to civility in the practice of law and the use of the court system, the current Code of Judicial Conduct permits such activities with some restrictions, as noted. There are at least six published opinions of the Judicial Ethics Committee that touch upon a judge's activities in the Community that may be useful to any further analysis of this issue. (Opinions 42, 45, 52, 100, 116 and 2003-26.)

II. Events

a. Political Events.

MARYLAND RULE 16-813 Canon 5 (A) (2005), generally prohibits partisan political activities by a judge unless a candidate for election, re-election or retention

¹⁵ See MARYLAND RULE 16-813 Canon 4 (2005).

to judicial office. It also requires that a judge resign when the judge becomes a candidate for a non-judicial office (Article 33 of the Maryland Declaration of Rights also prohibits a judge from holding a political office). The only narrow exception is that a judge may continue to hold judicial office while a candidate for election to or delegate in a Maryland constitutional convention.

MARYLAND RULE 16-813 Canon 5 (B) (2005), authorizes a judge who is a candidate for election, re-election or retention to judicial office to engage in partisan political activity with respect to that candidacy, but while doing so, the judge: (1) must not act as a leader or hold an office in a political organization, (2) must not make a speech for a candidate or political organization or publicly endorse a candidate for non-judicial office, (3) must maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, independence and integrity of the judiciary, (4) must not allow any other person to do what the judge is prohibited from doing, (5) must not make pledges or promises of conduct in office other than the faithful and impartial performance of the adjudicative duties of the office and must not announce the judge's views on disputed legal or political issues, (6) must not misrepresent the judge's identity or qualifications or other fact.

Although the MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A) (1) (b) (2000), is broad enough even to prohibit a judge from endorsing another judge who also is a candidate, Maryland has long permitted a public endorsement by one judicial candidate of another judicial candidate.

MODEL CODE OF JUDICIAL CONDUCT Canon 5 (A) (1) (d) (2000), barring a judicial candidate from attending political gatherings was omitted in recognition of

established ethics opinions and on grounds that because potential opponents will avail themselves of such opportunities for public exposure, judicial candidates should not be denied similar opportunity. In making these recommendations, we are aware that there are first amendment issues raised herein that are being considered in courts around the country. As a result, in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), the decision expanded a judge's ability to speak in public.

b. Community Events.

MARYLAND RULE 16-813 Canon 4 (2005), permits a judge to engage in avocational, extra-judicial activities subject to three basic restrictions set forth in Section A of the Canon. Section A provides that a judge must conduct those activities so that they do not (1) cause a substantial question as to the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.

The Canon is drafted such that it contains certain “permissive” sections and other “prohibitive” sections.¹⁶ In other words, it instructs judges as to what they may and may not do. However, the Canon does not contain any language that can be interpreted to actively encourage judges to participate in community events (although the Comments to the Canon indicate a judge should not become isolated from the community).¹⁷

MARYLAND RULE 16-813 Canon 4 (A) (2005), permits a judge to: (1) lecture, speak, teach and write, (2) accept an appointment to a governmental advisory commission, committee or position, (3) represent this country, a state or locality in

¹⁶ Id.

¹⁷ See MARYLAND RULE 16-813 Canon 4 (A) cmt. at 418 (2005).

connection with cultural, educational or historical activities, and (4) act as a director, member, etc. of a charitable, civic, educational, fraternal, sororal, law-related or religious organization. However, it prohibits a judge from serving in an organization that is conducted for the economic or political advantage of its members or will be engaged regularly in adversarial proceedings or deals with people who are referred to the organization by any court. It also prohibits a judge from soliciting funds or membership (subject to narrow exceptions), participating as a guest of honor or speaker at a fund-raising event, or using or lending the prestige of judicial office for fund-raising or soliciting membership.

c. Religious Gatherings.

MARYLAND RULE 16-813 Canon 4 (C) (4) (a) (2005), permits a judge to act as a director, member, non-legal advisor, officer or trustee of a religious organization. Obviously, a judge's involvement in such an organization is subject to the same restrictions and limitations that apply to political, community and social activities.

d. Social Events.

MARYLAND RULE 16-813 Canon 4 (2005), permits a judge to engage in social and recreational activities. Once again, however, such activities are subject to a multitude of restrictions, all of which are aimed at preserving the integrity and independence of the judiciary and avoiding any appearance of impropriety, favoritism or prejudice.

For example, MARYLAND RULE 16-813 Canon 2 (2005), requires that a judge shall (1) avoid impropriety and the appearance of impropriety and act at all times in a manner that promotes the public confidence of the integrity and impartiality of the judiciary, (2) not hold membership in any organization that practices invidious

discrimination on the basis of national origin, race, religion, or sex and (3) not allow judicial conduct to be improperly influenced or appear to be improperly influenced by a family, political, social, or other relationship and shall not convey or permit others to convey the impression that they are in a special position to influence judicial conduct.

III. Contents of a Judge's Speech

a. Pending and Potential Cases.

MARYLAND RULE 16-813 Canon 3 (2005), deals with the judiciary's performance of judicial duties and the importance of maintaining impartiality. Relative to pending and potential cases, judges are required to assure that every person who has a legal interest in the proceeding has the right to be heard and that during the proceeding, the judge shall neither initiate nor permit *ex parte* communications on substantive matters without the knowledge and consent of all parties.¹⁸ This prohibition does not extend to court personnel and to other judges whose function is to aid the judge in the exercise of his/her adjudicative responsibilities.¹⁹ A judge is permitted to seek the advice of an outside expert so long as the parties are advised as to the identity of the expert and the substance of the advice and afforded a reasonable opportunity to respond.²⁰ The most appropriate manner to obtain such advice would be an invitation for the expert to file a brief *amicus curiae*.²¹

¹⁸ MARYLAND RULE 16-813 Canon 3 (A) (5) (2005).

¹⁹ See MARYLAND RULE 16-813 Canon 3 (A) (5) cmt. at 412 (2005).

²⁰ MARYLAND RULE 16-813 Canon 3 (A) (5) (2005).

²¹ See MARYLAND RULE 16-813 Canon 3 (A) (5) cmt. at 412 (2005).

A judge should abstain from public comment regarding a pending or potential proceeding in any court.²² This restriction should be required on the part of the court personnel subject to the judge's direction and control.²³ This restriction on speech does not apply to situations where the judge is making public statements in the course of official duties or when they are explaining procedures of the court for the purpose of public information.²⁴

MARYLAND RULE 16-813 Canon 3 (A) (9) (2005), mandates that a judge shall perform their judicial duties without bias or prejudice. This restriction includes, but it not limited to, bias and/or prejudice manifested through words or conduct based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.²⁵ Similarly, employees subject to the judge's direction and control are not permitted to manifest such bias and/or prejudice.²⁶ The comment expands this idea to include a restriction against the judge engaging in conduct that could "reasonably be perceived" as sexual harassment.²⁷ Again, this standard must be required by the judge to apply to the conduct of those subject to the judge's direction and control.²⁸

b. Judge's opinions regarding other legal matters.

Judges are permitted to speak about their opinions regarding legal matters, so long as it does not interfere with the proper performance of judicial duties, does not reflect adversely upon their impartiality and does not detract from the dignity

²² Maryland Rule 16-813 Canon 3 (A) (7).

²³ Id.

²⁴ Id.

²⁵ Maryland Rule 16-813 Canon 3 (A) (9) (2005).

²⁶ Id.

²⁷ Maryland Rule 16-813 Canon 3 (A) (9) cmt. at 413 (2005).

²⁸ Id.

of the office.²⁹ Subject to these restrictions, judges may also appear before and confer with public bodies or officials on matters concerning the judiciary and/or the administration of justice.³⁰ A judge can also serve on governmental advisory bodies that are devoted to improving the law, the legal system, and/or the administration of justice.³¹ The rules also state that judges may represent their country, state or locality for ceremonies related to historical, educational or cultural activities.³² However, the comments to the rule includes the committee's concerns that judges will overextend themselves and that the term "matters concerning the law" is too broad of a definition.³³ Instead, the comments suggest that a judge's participation before public bodies or officials should be strictly limited to matters involving the judiciary or administration of justice.³⁴

IV. Recusal

The following is a review of the Code of Conduct for Judicial Appointees, MARYLAND RULE 16-814 Canon 3 (C) (2005), in regard to the circumstances under which a judge should or must recuse themselves from a case after speaking or appearing before a bar association or community group promoting professionalism and later having someone from that bar association or community group appear before them as a judicial officer.

The essence of the need for recusal under MARYLAND RULE 16-814 Canon 3 (C) (2005) is to avoid situations in which the "impartiality" of any judicial officer "might reasonably be questioned". MARYLAND RULE 16-814 Canon 3 (C) (1) (2005), provides that a judge

²⁹ Maryland Rule 16-813 Canon 4 (2005).

³⁰ Maryland Rule 16-813 Canon 4 (B) (2005).

³¹ Id.

³² Id.

³³ Maryland Rule 16-813 Canon 4 (B) (3) cmt. at 418 (2005).

³⁴ Id.

“should not participate” in a proceeding in which the judge’s impartiality might reasonably be questioned. MARYLAND RULE 16-814 Canon 3 (C) (2005), has been expanded regarding situations in which a judge’s impartiality might be questioned because a judge or a judge’s family member has a significant financial interest in the subject matter of the controversy or in a party to the proceeding. The comments to current MARYLAND RULE 16-814 Canon 3 (C) (2005), are very specific to the point of providing a minimum standard for determining what constitutes a “significant financial interest”. That standard was defined as “(1) Ownership of an interest as the result of which the owner has received within the past 3 years, is currently receiving, or in the future is entitled to receive, more than \$1,000.00 per year; or (2) (i) ownership of more than 3% of a business entity; or (ii) ownership of securities of any kind that represent, or are convertible into, ownership of more than 3% of a business entity.”³⁵ The current comment has expanded this specific minimum standard to further encompass situations where, “...[t]here may be situations that involve a lesser financial interest but nonetheless require recusal because of the judge’s own sense of propriety ... [c]onversely, there are situations where participation may be appropriate even though the ‘financial interest’ threshold is present”. The rule provides that where a judge fails the “financial interest” threshold test, the judge must obtain an opinion from the Judicial Ethics Committee with regard to whether recusal is necessary, except in a situation where there is non-recusal by agreement, pursuant to MARYLAND RULE 16-814 Canon (D) (2005).

MARYLAND RULE 16-814 (C) (1) (e) (i) (ii) and (iii) (2005), states that a judge must recuse himself or herself if the judge, the judge’s spouse, an individual within the third degree of relationship to either of them, or the spouse of such an individual party is a party to the proceeding, or a director, officer or trustee of a party: is acting as a lawyer in the

³⁵ MARYLAND RULE 16-814 Canon 3 (C) cmt. at 434 (2005).

proceeding, is known by the judge to have a financial interest that could be substantially affected by the proceeding, or is likely to be a material witness in the proceeding.

It should also be noted that MARYLAND RULE 16-814 (D) (2005), expands the situations in which recusal may be waived. Notwithstanding the basis for recusal, recusal may be waived if the parties and the lawyers agree, and the judge is willing to participate. Any such non-recusal agreement must be put on the record.³⁶

The more we encourage judges to speak or appear before bar associations or community groups the greater the likelihood that circumstances will arise causing judges to recuse themselves. This may create greater issues in jurisdictions with few or only one judge. But, it may be in those very jurisdictions that a judge could have the greatest impact in promoting professionalism.

V. Recommendations

- Provide either a Rules change or a comment to MARYLAND RULE 16-813 Canon 4 (2005), making more explicit the intent of the Court and the Commission that judges be encouraged to engage in greater interaction between the bench, the bar and the community.
- Train judges on recusal rules, and update sitting judges on any recusal rule changes.
- Continue to include issues of professionalism in all judicial training sessions.
- Provide a system to obtain advisory opinions from the Judicial Ethics Committee and have the Commission take poll to assess the adequacy of the present system.

³⁶ Id.

- Encourage judges to prepare what they are going to say by writing it down and reviewing it before any speaking engagement and utilize the services of the Court Information Office.
- Increase judges' awareness of the opinions of the Judicial Ethics Report (e.g. Reinstate mailing to each judge, a hard copy of each Judicial Ethics report.)
- Mel Hirshman to write a column in "Justice Matters"

Conclusion

The Maryland Code of Judicial Conduct recognizes the importance of the judiciary not only in the administration of justice but also in the community. It is important for the judiciary to assume an active role in community functions to promote justice, civility and professionalism, in addition to promoting and upholding the honor of the judiciary in the community. The Code provides the guidelines for judges to follow to assume an active role in the community without compromising the integrity of the bench. Community involvement in promoting professionalism is strongly encouraged and judges should seize any opportunity to become involved.